within the time required. The appellant was given time to file the defence within a week after the magistrate was satisfied that there was a valid defence. Subsequently, the appellant filed a statement of defence in the form of a letter addressed to the magistrate and a certified copy to the respondent's solicitors. Thereafter the respondent's solicitors wrote to the appellant by A.R. Register informing him that the defence was not in proper form and requesting him to file a defence in the proper form, otherwise they would apply to the court to have the defence struck out.

On March 22, 1972, when the case came before the learned magistrate, on the application by the respondent's counsel the magistrate made an order precluding the appellant from defending and gave judgment in favour of the respondent with costs.

Now, the accepted principle that has been followed in the matter of procedure is that courts prefer that cases should be decided on their merits and do not invoke procedural rules to prevent a defendant from defending an action unless the defendant has no merits in his defence. (Principle as quoted in *Foo Chiew Fong* v. *Guriman*[1]).

On scrutiny of the letter which has been filed (page 10 of record), it appears that the form of defence as required under O.10 r.4 of the Subordinate Courts Rules has been complied with. Mr. Tan for the respondent does not object as to the use of the national language in view of the National Language Act, 1963, except of course for the letter being addressed to the magistrate and being copied to the solicitors for the respondent. The letter admits part of the claim totalling $125 but not to the full claim of $305 and gives reasons for the same. In my view, there is a triable issue which merits full hearing regarding the balance sum not admitted and as envisaged by the learned magistrate earlier there was a valid defence.

The requirement of O.10 r.3(1) needs further scrutiny especially in the light of reported authorities on the matter. No doubt that Order is mandatory because of the word "shall", but in *Abdul Rahman* v. *Paijah*,[2] Terrell Ag. C.J. dealt with a similar point under section 96 of the Civil Procedure Code (Cap. 7). There the respondent submitted a written statement which was not verified under the requirements of that section. It was held that such failure was an irregularity which could be cured at any time. The case of *Grey* v. *Kong*,[3] was cited. In that case the defendant never appeared on receipt of summons but merely wrote a letter to the registrar stating, by way of defence, that the suit was barred by limitation. The Court of Appeal held that effect should be given to the plea and treated the letter as a "written statement" within the meaning of section 87 of the Civil Procedure Code 1902, which is equivalent to section 91 of the Civil Procedure Code. (F.M.S. Cap. 7).

Now, section 96 of the Civil Procedure Code contains a mandatory requirement that written statements shall be signed and verified in the manner provided for signing and verifying claims as provided in the earlier sections. Such statement shall not be received by the court unless it is so signed and verified. In view of these authorities, I am of the considered opinion that non-compliance merely as to form as required by O.10 r.3(1) of the Subordinate Courts Rules is an irregularity which can be cured. The magistrate ought to have proceeded with the hearing, and if he was of the opinion that the statement of defence should be submitted in the proper form, he could have adjourned the case for the purpose and order the appellant to pay the costs. I think this is a proper case where the epithet "that the rules of procedure should be the handmaiden and not the master" be applied.

The appeal is therefore allowed, the judgment is set aside, the appellant is ordered to submit a statement of defence in the proper form within one week from the date of the order and the case is remitted to the learned magistrate, Langkawi, for a full hearing.

I order the appellant to pay the costs of the hearing before the magistrate on March 22, 1972.

As regards this appeal, there is no order as to costs.

Appeal allowed.

LEE KIM MAN v. CHIN KON SANG

[O.C.J. (Lee Hun Hoe J.) January 12, 1973]

[Kota Kinabalu — Civil Suit No. 219 of 1972]

Practice and Procedure — Specially indorsed writ — Whether available for actions in negligence — R.S.C. 1957, O. 3, r. 6.

In this case the defendant applied to set aside a specially indorsed writ of summons on the ground that the writ contained a claim for damages for negligence under the Civil Law Act, 1956.

Held, the plaintiff was entitled to have his writ specially indorsed under Order 3 rule 6(1) of the Rules of the Supreme Court and therefore the application in this case must be dismissed.

Cases referred to:-

(1) *Lee Chin Ho* v. *Lim Mah Chye* Penang Suit No. 140 of 1912.

(2) *Kong Kim Ching* v. *Hassan bin Dia & Ors.* Ipoh Civil Suit No. 5 of 1971.

(3) *Dummer* v. *Brown & Anor.* [1953] 1 Q.B. 710.

CIVIL SUIT.

Chong Thian Vun for the plaintiff.

Shelley Yap for the defendant.

Lee Hun Hoe J.: This is an application by defendant by way of Summons-in-Chambers to set aside the specially indorsed writ of summons and the service thereof and all subsequent proceedings on the ground that the writ was not indorsed in accordance with Order 3 rule 3 of the Rules of the Supreme Court. It was stated that the statement of claim indorsed in the writ in the present proceedings contains a claim for damages under the Civil Law Act, 1956 for the death of Lee Tua Peck alias Lee Twa Teck from injuries allegedly caused by the negligent driving of the defendant and is excepted from the provision of Order 3 rule 6. Consequently the indorsement on the writ was not in accordance with Order 3 rule 3.

Reference was made to the case of *Lee Chin Ho* v. *Lim Mah Chye*[1] mentioned in *Mallal's* Supreme Court Practice at pages 34 and 35 under the heading of "Unliquidated Damages". In that case the plaintiff sued the defendant on a building contract to which he was not a party but alleged that the defendant was a surety for the performance of the contract by the contractor. It appeared that the defendant had executed a bond, of same date, in a stated amount, conditioned to be void if the contractor performed the aforesaid contract. Held (1) the defendant was wrongly sued on the contract, (2) that his liability was on the bond, (3) that the amount the contractor had stipulated, by the said contract, to pay per day to the plaintiff, for delay in completing the building, did not form a measure of the defendant's liability on his bond, (4) that the defendant's liability was in unliquidated damages, (5) the plaintiff could not, in respect thereof, issue a specially indorsed writ under the provision of the Civil Procedure Code corresponding to clause (b) of this rule.

Defendant submitted that in the same way claim for general damages could not be included in a specially indorsed writ. He further submitted that under the proviso to O.3 r.6(2) specially indorsed writ would not be applicable to cases of negligence. The only authority he could find is the unreported case of *Kong Kim Ching* v. *Hassan bin Dia & Ors.*[2] This case was heard by Chang Min Tat J. The point raised in that case was in connection with the question of fraud under O.3 r.6(1). Defendant conceded that that case was not directly of much assistance to the present case which was concerned with O.3 r.6(2).

Plaintiff, rightly, pointed out that *Lee Chin Ho's* case was cited in connection with Singapore O.3 r.5(1)(b) and has no relevance as the Singapore O.3 is entirely different from Malaysia O.3. It was also a case decided before the adoption of the 1957 Rules of the Supreme Court. Singapore O.3 r.5 was taken from the English O.3 r.6 but without amendment made in 1933. On the other hand our O.3 r.6 which was also taken from the English O.3 r.6 but with all the amendments made in 1933, 1937 and 1954 provides that in any action the writ of summons may be accompanied by a statement of claim except in actions for libel, slander, malicious prosecution, false imprisonment, seduction, breach of promise of marriage and where fraud is alleged. Thus the distinction between liquidated and unliquidated claims (which still exists in the Singapore rule*) has been removed, except as to the question of costs under O.3 r.7.

Prior to 1963 East Malaysia and Brunei were governed by the Sarawak, North Borneo and Brunei High Court (Civil Procedure) Rules which were made under section 22 of the Sarawak, North Borneo and Brunei (Courts) Order in Council 1951.

Chang Min Tat J. in *Kong Kim Ching's* case had taken considerable pains to compare the present O.3 r.6 with its predecessor. I am indebted for his research as it has lightened my task in going into the history of the Rules of the Supreme Court, 1957. The *Annual Practice* 1957 in a note states that the Rules of the Supreme Court was the "Rules of the Supreme Court 1883, as amended by Rules of the Supreme Court January, 1902, 8.1., R.S.C. (No. 1) 1929, R.S.C. (No. 1) 1933, R.S.C. (No. 1) 1935 and R.S.C. (Special Indorsements and Trial without Pleadings) 1954". It was not until 1954 that a rule providing for special indorsements and trial without pleadings were made. The position of the Rules in Malaya as Chang Min Tat J. stated, after 1956 was that of England after 1932 in the King's Bench Division and after 1954 or 1955 in the Chancery Division as well.

With the formation of Malaysia the Rules of the Supreme Court, 1957 were extended and applied in Sabah in 1963 by virtue of G.N.S. 153 of 1963. The Rules were substantially the same as the English Rules as contained in the *Annual Practice* 1957 except for amendments to suit local conditions.

Order 3 rule 6 reads: —

"6(1) In any action other than one which includes:

(a) a claim by the plaintiff for libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage; or

(b) a claim by the plaintiff on an allegation of fraud,

the writ of summons may, at the option of the plaintiff be specially indorsed with or accompanied by a statement of his claim.

(2) In any action to which paragraph (1) of this Rule applies a plaintiff who does not exercise his option to have his writ specially indorsed or accompanied by a statement of claim shall not be entitled to any greater costs than he would have been entitled to if he had exercised that option, unless the order for his costs otherwise expressly provides, and such an order shall not otherwise expressly provide unless a court or judge making the order is satisfied that there was good reason for the plaintiff not exercising the option:

Provided that this paragraph shall not apply to any action which includes a claim by the plaintiff for damages for negligence, nuisance, or breach of duty (whether the duty exists by virtue of a contract or a provision made by or under a statute or independently of any contract any such provision) where the damages claimed by the plaintiff for negligence, nuisance or breach of duty consist of or include damages —

(a) in respect of personal injuries to any person; or

(b) in respect of damages to a vehicle, being damage to a vehicle arising out of an accident on any road, whether a highway or not;

or to any action in respect of the death of any person under the Civil Law Ordinance, 1956 or under any written law relating to the carriage by air in force in the Federation.

In this paragraph 'personal injuries' include any disease and any impairment to a person's physical or mental condition."

By O.3 r.6(1) in any action except libel, slander, malicious prosecution, false imprisonment, seduction, breach of promise of marriage and where fraud is alleged the plaintiff at his option, may have his writ specially indorsed with or accompanied by a statement of claim. By O.3 r.6(2) a plaintiff who does not exercise his option under this rule is not entitled to any greater costs than he would have been entitled had he exercised his option but this is not the case where the claim includes damages for negligence, nuisance or breach of duty in respect of:

(i) personal injury to any person; or

(ii) damage to a vehicle arising out of an accident on any road whether a highway or not; or

* The Singapore R.S.C. 1934 have since been repealed and replaced by the R.S.C. 1970.

(iii) the death or any person under the Civil Law Act, 1956 or under any written law relating to the carriage by air.

O.3 r.6(2) would appear to deal with the question of costs and provide for the penalty of costs where a plaintiff fails to exercise his option under O.3 r.6(1). It would also appear that the proviso to O.3 r.6(2) makes clear that a plaintiff shall not be penalised for costs if he does not have his writ specially indorsed when his claim includes damages for negligence, nuisance or breach of duty in respect of accidents causing death or personal injuries.

There is force in plaintiff's contention that O.3 r.6(1) does not circumscribe O.3 r.6(2) and therefore it does not prohibit the use of specially indorsed writ in a claim under this Civil Law Act 1956 for negligence. However, plaintiff also could find no authority directly on the point. *Mallal's* Supreme Court Practice at page 138 dealing with O.14 r.1 under the heading of "Action for Damages for Negligence" states: —

"The procedure under this Order read in conjunction with O. 3 r. 6 can be applied to an action for damages for negligence arising out of accidents causing death or personal injuries. *Dummer* v. *Brown* [1953] 1 Q.B. 710; [1953] 2 W.L.R. 984; [1953] 1 All E.R. 1158, C.A.".

The advantages of special indorsement is that if defendant enters appearance to a specially indorsed writ plaintiff can apply for summary judgment under O.14. But under O.14 r.1(b) plaintiff cannot apply for summary judgment even if plaintiff has specially indorsed his writ if the claim which is not one capable of being specially indorsed under O.3 r.6 has been included in the indorsement on the writ. O.14 is a procedure whereby plaintiff could obtain speedy judgment when a defendant has no defence or when a defence has nothing that looks like a defence. The granting of summary judgment is discretionary in a judge.

In *Dummer* v. *Brown & Another*[3] the plaintiff, whose husband had been killed when riding as a passenger in a motor-coach owned by the first defendant and driven by the second defendant, sued both defendants for damages under the Fatal Accidents Act. The writ and statement of claim in the action were delivered together. The defendants by their defence made no admissions save that on the day in question the first defendant's motor-coach was being driven on the road in question by the second defendant, and they put the plaintiff to proof of her case. The second defendant having been convicted at Bedford Assizes of dangerous driving (to which he pleaded guilty) and sentenced to imprisonment, the plaintiff applied to a master for leave under O.14 to sign summary judgment and in support of the application filed an affidavit in which she mentioned the conviction and the admission of the driver of the coach. The master refused the application but McNair J. on appeal to him in chambers, reversed the master's order and gave leave to plaintiff to sign judgment against the defendants for damages to be assessed. The defendants appealed, contending that O.14 was not applicable to action for damages under Lord Campbell's Act. Held (*per totam curiam*), that procedure under O.14 read in conjunction with O.3 r.6 was applicable to claim in negligence arising out of accidents causing death or personal injuries, though the proportion of such cases which would be suitable subjects for summary procedure must be very small. Held further, per Jenkins and Morris L.JJ. that the affidavit sworn by plaintiff, though open to criticism, in that it turned on matters which were not within the plaintiff's own knowledge and failed to state, in accordance with the rules of court, the dependent's means of knowledge had not been answered by the defendants by an affidavit giving some indication of a real defence on the issue of liability, and therefore, the judge having in the exercise of discretion come to the conclusion that there was no defence, and it being a proper case for summary judgment, the appeal should be dismissed.

In that case Jenkins L.J. at page 718 stated:

"There is no doubt that Ord. 14 in its present form, read in conjunction with Ord. 3. r. 6, in its present form does enable an action of this kind to be under the subject or proceedings for summary judgment under Ord. 14. It is obvious that the proportion of cases of this kind, that is to say, claim in negligence arising out of accidents causing death or personal injuries, which would be suitable subjects for summary procedure, must be small indeed. But, so far as the rules are concerned, there is no procedural reason why that course should not be adopted in a proper case of this class."

The *White Book* 1963 at page 242 under the heading of "General Scope of O.14" states that: —

"Actions for damages in negligence are suitable for procedure under O. 14 proceedings only if it is clearly established that there is no defence as to liability (*Dummer* v. *Brown & Anor.* [1953] 2 W.L.R. 984)".

And at page 24 dealing with O.3 r.6 under the heading of "May, at the option of the plaintiff," notes that:

"the use of the specially indorsed writ is still, as it always has been, optional. All the considerations which before 1954 induced a plaintiff to use or to discard the form of procedure for the purposes of O. 14 continue to apply; the specially indorsed writ serves no useful purpose to prosecute claims for damages unless the plaintiff has really good grounds for believing that there is no defence — save as to *quantum* of damages, and even then is not very appropriate. Where the claim is for a liquidated sum, summary procedure may continue to be used as an effective and expeditious method of securing payment of a debt which is justly due."

Under O.3 r.6(1) a plaintiff may, at his option, have his writ specially indorsed in any action except libel, slander, malicious prosecution, false imprisonment, seduction, breach of promise of marriage and where fraud is alleged. O.3 r.6(2) would seem to encourage a plaintiff to exercise his option to have his writ specially indorsed for if he does not do so he would not get any greater costs. But in the case of a claim which includes negligence, nuisance or breach of duty arising out of accident causing death or personal injuries he would not be penalised if he does not exercise his option to have his writ specially indorsed. The implication is that there is nothing to prevent him from having his writ specially indorsed in a case where his claim includes negligence arising out of accident causing death or personal injuries. Unless a plaintiff has good grounds for believing that there is no defence there is no procedural advantage for him to have his writ specially indorsed in such a case.

For reasons given I would dismiss the application.

Application dismissed.